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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1103

IN THE MATTER OF
OF
METROPOLITAN REALTY
CORPORATION

IN PROCEEDINGS FOR
REORGANIZATION OF
A CORPORATION

Application for Writ of Certiorari by METROPOLITAN REALTY CORPORATION to review adverse decision of the United States Court of Appeals for the Fifth Circuit.

METROPOLITAN REALTY
CORPORATION

Of Counsel:
FRANZ JOSEPH BADDOCK
400 Fidelity National Bank Building
Baton Rouge, Louisiana 70801
(DD3-0194)

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COLLIER ON BANKRUPTCY, 14th Edition Vol. 6 1

CHAPTER X OF THE BANKRUPTCY ACT* (11 U.S.C. 501 et seq) 1

*Sections: 106(3), 113, 121, 130, 141, 144, 148, 156, 161, 164, 169, 188, 199. ..... 2, 3, 9, 10, 20, 21

IN THE
SUPREME COURT OF THE UNITED STATES

No.

IN THE MATTER	**IN PROCEEDINGS FOR**
OF	**REORGANIZATION OF**
METROPOLITAN REALTY	**A CORPORATION**
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Application for Writ of Certiorari by METROPOLITAN REALTY CORPORATION to review adverse decision of the United States Court of Appeals for the Fifth Circuit.

In event writ is granted, counsel will seek admission under Revised RULE 5. Text references are to Collier on Bankruptcy, 14th Ed., Vol. 6. Statutory references are to Sections of the Bankruptcy Act — Sections 101 et seq (11 U.S.C. Sections 501 et seq)

MAY IT PLEASE THE COURT:

In compliance with Revised RULE 23 of This Court

SECTION

1. (a) **The opinion of the U. S. District Court, E.D. LA., Baton Rouge Division, and opinion of the Fifth Circuit, together with denial of rehearing, are appended herewith.**

I. (b) The grounds on which jurisdiction of This Court are invoked are:

A) The decision of the Fifth Circuit is in conflict with decisions of the Seventh Circuit.

B) The Fifth Circuit has decided an important question of federal law which has not been, but should be, decided by This Court.

C) The Fifth Circuit has decided a federal question in a way in conflict with applicable questions of This Court — more particularly *Marine Harbor Properties, Inc. v. Manufacturer's Trust Co.*, 1962, 317 U.S. 78, 63 S. Ct. 93 87 L. Ed. 64.

D) The Fifth Circuit, in upholding dismissal of reorganization petition without affording hearing to creditors (Sec. 161) has so far sanctioned such a departure by a lower court from the accepted and usual course of judicial proceedings, as to call for an exercise of This Court's power of supervision.

E) The Fifth Circuit, in upholding dismissal without findings of fact and conclusions of law pertaining thereto, has violated RULE 52 of the Federal Rules of Civil Procedure, and GENERAL ORDERS 37 and 47 of the Supreme Court.

I. (b)
(i) (ii) The opinion of the U. S. District Court was entered May 6, 1970.
The judgment or decree sought to be

reviewed, is dated and was entered by the Fifth Circuit on October 27, 1970.

The date of the order respecting a rehearing is November 17, 1970. There is no order granting an extension of time within which to petition for certiorari. However, under date of November 19, 1970, counsel was advised by Clerk of the Fifth Circuit that the mandate in this case had been stayed to DECEMBER 19, 1970, and if during the period of the stay there is filed with the Clerk of the Fifth Circuit a notice from the Clerk of the Supreme Court that applicant has filed a petition for writ in the Supreme Court, stay of mandate shall continue until final disposition by the Supreme Court.

I. (b) (iii) 11 U.S.C. 47(c) and 28 U.S.C. 1254(1), 2101(c) (11 USCA 47(c) and 28 USCA 1254(1), 2101(c)) confer jurisdiction on This Court to review by certiorari.

I. (c) NO. 1: The questions presented for review are: It is a violation per se of the Bankruptcy Act, to form a corporation in order to obtain Chapter X relief?

NO. 2: Where a debtor cannot be continued in possession because of indebtedness of $250,000.00 or over (Sec. 156), and where *Listing of creditors* (Sec. 168) and *Preparation of plan* (Sec. 169) are placed on trustee, can a District Court dismiss a petition

a) *without* affording hearing to creditors (Sec. 161)
b) *prior* to time any plan is proposed, and
c) *without* findings of fact and conclusions of law, as required by RULE 52 of the Federal Rules of Civil Procedure and GENERAL ORDERS 37 and 47 of the Supreme Court?

NO. 3: In a case wherein substantial U. S. Tax Liabilities in excess of $100,000.00 are involved, is it permissible for a District Court to *deny* Internal Revenue benefit of Sec. 199 without affording Internal Revenue opportunity to appear?

NO. 4 Where *subordination* of a mortgage creditor's claim may be involved, is it permissible for a District Court to *deny* opportunity for judicial evaluation — where substantial rights of Internal Revenue and Other Creditors may be adversely affected?

1. (d) This case involves primarily an interpretation of Chapter X of the Bankruptcy Act, in particular reference to the Sections refered to herein, as well as RULE 52 of the Federal Rules of Civil Procedure, and GENERAL ORDERS 37 and 47 of the Supreme Court.

1. (e) A concise statement of the case follows:

Project-developer AL H. GERMAN secured several millions of long-term financing through PRUDENTIAL INSURANCE COMPANY, one involving a $2,300,000.00 commitment re a project known as the PRINCE MURAT INN in Baton Rouge, La. The Fidelity National Bank of Baton Rouge (through a unique arrangement referred to later) handled interim financing to the extent (according to their allegations) of $344,000.00, $1,700,000.00, $600,000.00 and $755,865.35. Evidently these were insufficient to pay all creditors who had supplied building materials and supplies, etc., for the project. Liens to the extent of $826,211.30 (including $104,801.58 of Tax Liens in favor of U. S. Internal Revenue) were recorded against the project.

Fidelity foreclosed on its mortgages in No. *140,621 D* of the 19th Judicial District Court of Louisiana, and thereafter an involuntary petition in bankruptcy was filed against German in the U. S. District Court, E.D. LA., Baton Rouge Division, bearing docket No. BK. 70-167. (This latter proceeding is still pending on Motions To Dismiss. No decision has been reached — no answer has been filed — no adjudication has been made.)

Prior to any appearance by German, the bankruptcy court issued a stay order against *Fidelity* enjoining foreclosure. However, the court later *ex parte* modified its order to permit foreclosure, apparently on the basis that Sec. 11 of the Bankruptcy Act (11 USC 29) limited its authority. It was at this time, and only after the above had transpired, that undersigned local counsel became counsel for Mr. German in the involuntary proceeding.

Faced with admission from Internal Revenue that their Tax Liens were worthless in foreclosure (being primed not only by the bank but by other lien holders according to the rank of recording) *and* the realization that extensive creditors who had supplied building materials and services, etc., were in danger of suffering loss, and awareness that the bank's security interests might be subject to *subordination* (amplified later), Mr. German transferred the PRINCE MURAT INN to Metropolitan Realty Corporation on May 1, 1970 — a shell corporation organized solely to attain benefit of Chapter X *FOR CREDITORS!* However, transfer and application for Chapter X would NOT have been made, except for the overriding fact that additional financing of $2,000,000.00 over and above Prudential's commitment of $2,300,000.00 had become a definite possibility. When availability of this had progressed to reasonable certainty, and only on condition that proponents of this arrangement could give assurances to the Court, was an election made to file for Chapter X!

The petition was presented to the District Judge in early afternoon of May 5th 1970. He declined to question counsel, or proponents of arrangement, stating that the petition could be submitted to the Referee.

In mid-afternoon, the petition was presented the Referee. Few questions were asked of counsel, or proponents of the arrangement. When, it becoming late, the Referee indicating neither approval nor disapproval, counsel asked for permission to *file* the petition with the clerk, so as to show a May 5th filing date.

At 9:00 A.M. on May 6th, Referee Posner telephoned counsel he would recommend dismissal. At 9:25 A.M. counsel recorded a Notice of the filing for reorganization, in the records of East Baton Rouge Parish, which not only identified the property, the pending reorganization proceedings, but referred specifically to No. *140,621 D* of the 19th Judicial District Court.

At 10:00 A.M. on the same date of May 6th 1970, the Sheriff sold the PRINCE MURAT INN, under foreclosure in *140,621 D*, to the Fidelity National Bank (the foreclosing creditor) for $2,200,000.00! — after reading a mortgage certificate listing the $626,211.30 of creditors (including Internal Revenue's claim) and Notice of the Reorganization Proceeding filed at 9:25 A.M. (When appeal to the Fifth Circuit was taken, another *Notice* thereto was filed in the same records, on June 5th 1970. On November 27th, 1970, we also filed a Notice pertaining to the stay of mandate in this cause, pending application to the Supreme Court)

The fears that we entertained, and fully warned the U. S. District Court in petition, *were* properly grounded. The Sheriff's sale brought an insufficient amount to pay all claimants, and $626,211.30 of creditors (including U. S. Tax Claims of $104,201.58) were literally washed out into the abyss of destruction! All this was done ***WITHOUT IOTA OF OPPORTUNITY FOR CREDITORS TO BE HEARD*** in the reorganization matter!

1. (f) (not applicable)

1. (g) The basis for federal jurisdiction in the court of first instance lies entirely in Chapter X.

1. (h) Direct and concise arguments amplifying the reasons relied on for the allowance of the writ are:

RE: QUESTION NO. 1

Prior to enactment of Chapter X, there developed a rule in Federal Courts that a corporation formed for purposes of seeking reorganization relief *per se* violated purposes of the reorganization acts. The leading case appears *Milwaukee Postal Bldg. Corp. v. McCann*, 8 Cir. 1938, 95 F. 2d 948. However, this rule was criticized (Collier Par. 6.07 pp's 1028-1031) and not followed by the Seventh Circuit. The latter, in *Matter of Loeb Apartments, Inc.* (1937) 89 F. 2d 461, 463 said:

> "It is urged that the fact that it seems probable that this corporation was organized for the purpose of filing a petition . . . is a bar to a finding of good faith. *No court is justified in making this one fact, arbitrarily, the determinative factor of good faith.*"

To the same effect: *Kreuger v. Knickerbocker Hotel Co.* (C.C.A. 7th 1936) 81 F. 2d 981.

McCann, supra, was decided April 9, 1938. Thereafter, the same year, Congress *repealed* Sec. 77B of the Bankruptcy Act, on which *McCann* was based, and

replaced same with Chapter X. Sec. 156 was substituted in place of Sec. 77B(c)(1). Under the latter, a debtor could be continued in possession. This is no longer possible under Sec. 156 when the debts are $250,000.00 or over. Thus, the stigma of a debtor resorting to reorganization to escape creditors by remaining in possession, appears to be eradicated in any case involving creditors of $250,000.00 or over — as in the instant case.

Therefore, *McCann*, although a scholarly decision, was in reference to a

> "* * * * statute confusingly drawn, with 'a weakness of structural construction' and a plethora of omissions and ambiguities which led to unnecessary litigation, but it was also deficient in achieving a real correction of some of the abuses of the equity receivership procedure it was designed to supplant. Indeed, it was claimed in some quarters that certain reprehensible practices merely flourished in the new soil." Collier P. 0.08 p. 92

Speaking of the change in Sec. 156, Collier in Par. 7.01 p. 1148 says:

> "These provisions insure that in the larger cases, as contrasted with former Sec. 77B, the debtor may not be continued in possession at the discretion of the judge, and that 'friendly trustees', perhaps including the officers of the debtor, may not be appointed. Yet the statute, when necessary in the operation of the debtor's

> business, allows use to be made of the management skill and experience of officers or employees of the debtor."

Counsel assumes that Congress was aware of the prior jurisprudence. Thus, when it enacted Chapter X it could have provided in Sec. 106(3):

> "(3) 'corporation' shall mean a corporation, as defined in this Act, which could be adjudged a bankrupt under the Act, (provided such corporation was not formed in order to obtain benefit of this Act, which latter corporation is excluded from the definition thereof . . .) . . . *() supplied*

Further, Congress could have added a provision in Sec. 146:

> "Sec. 146. Without limiting the generality of the meaning of the term 'good faith', a petition shall be deemed not to be filed in good faith if —
>
> ((5) the debtor corporation was formed for the purpose of obtaining relief under Chapter X.) *() supplied*

Not only do we fail to perceive any such () enclosed provisions, we fail to perceive any such intent from the House Report on the Chandler Act. Collier Par. 0.08 at pp's 97-98. Rather, the decision herein distorts the basic aim of the Act "* * * to vitalize the consent

of creditors . . ." and enlarge "* * * the right of parties in interest to be heard." — *especially* the view that the *creditor* "* * * is given the right to be hear on all matters"! (Italics ours). Thus, the decision herein appears entirely unsupported by statutory provisions of Chapter X, and directly in opposition to the intent of Congress in enacting the Act.

Further, the instant decision has disastrous results for the extensive creditors who have supplied construction materials and supplies, as well as for U. S. Internal Revenue, whose only hopes of salvation lie in Chapter X relief!

RE: QUESTION NO. 2

If the Fifth Circuit envisioned anything beyond a *per se* invalidity of petition, it has used unfair and unnecessarily harsh language in its decision! May the Supreme Court note the observation from Collier (footnote) p. 1031:

> "If . . . the individual debtor transfers his property to a company incorporated to take title thereto and assume his obligations, and that corporation thereafter proceeds, or is proceeded against, under Chapter X, *we believe that the judge should not for that reason alone hold the petition lacks good faith.*" (Italics ours)

Yet, in spite of the fact that a counsel follows what is approved by the Seventh Circuit and a leading treatise

on bankruptcy (a treatise cited as authority by the Fifth Circuit in opinion), he is met with "sinister or unworthy purposes" and "the admittedly tainted circumstances in the formation of the corporation." What is worse is that these charges stand WITHOUT AN IOTA OF FINDING OF FACT OR CONCLUSION OF LAW PERTAINING THERETO! *What* sinister — *what* unworthy purpose — *what* tainted circumstances?

Did the Court surmise that the loan proponents would be unsuccessful? On what facts could the Court make such a finding?

Did the Court surmise a fraudulent scheme on the part of Mr. German to shield property from creditors? How is this possible under Sec. 156? Does this not, paradoxically, cast a stigma on reorganization procedure?

Did the Court erroneously conclude it was the duty of *petitioner* to provide a satisfactory plan in advance? If so, how does this accord with Sec. 169?

Was the Court displeased with the happenings in *In re Southern Land Title Corp.*, E.D. La 1968, 301 F. Supp 379, 428 or *In re Plaza Towers, Inc.*, E. D. La 1967, 294 F. Supp 714, 720? If so, was this any reason to charge instant petitioner with cause therefor, when the parties involved in these two cases are totally unknown to petitioner and its counsel?

Was the Court suspicious of our motive in wanting U. S. Tax Liabilities paid? Taxes constitute a non-dis-

chargeable debt under Sec. 17 a. (1) of the Bankruptcy Act, and because of this, any counsel would seek to have such claims discharged by payment.

Were we of "sinister or unworthy purpose" in desiring that *creditors* who had supplied construction materials and services, be paid? If not, was the "tainted circumstances" on account of our suggesting that a Federal Bank's Security Interest might be subject to the equitable doctrine of "subordination"?

Interestingly enough, it is a decision of the *Fifth* Circuit that criticizes departure from accepted and usual course of judicial proceedings condoned herein. In surveying the pertinent jurisprudence, *R. L. Witter Associates, Inc. v. Esbary Gypsum Co., Inc.* (5th Cir. 1938) 93 F. 2d 746, 748-9 said:

> "• • • . . . where the good faith of the filing is attacked BEFORE the plan stage has been reached, unless the IMPOSSIBILITY of conforming to and obtaining the benefits of the statute *CLEARLY APPEARS, THE PETITION SHOULD NOT BE DISMISSED AS NOT FILED IN GOOD FAITH.* It should be retained and questions of plan and reorganization worked out in the *thorough and complete way the statute provides . . .*" (Caps and Italics ours)

Further, *Esbary* announced the rule of cardinal importance that a reorganization court

"... should *NOT*, however, *BEFORE* the stage of plan submitting has arrived, examine into the feasibility or reorganization with the searching intensity required, when a plan or plans having been submitted ... the good faith, and feasibility of plans for reorganization come directly up."

"(4-6) A recognition of this difference in emphasis upon the question of plan and of reorganization feasibility, when, by an attack upon the good faith of a proposed submitted plan these matters are *DIRECTLY* up, and when, by an attack upon the petition, as not filed in good faith they are only *incidentally* or *collaterally* up, is sufficiently, we think, if not always clearly, manifested in the cases." (Caps and Italics ours)

Collier is in accord: Par. 0.11 p. 119, Par. 6.09 pp's 1040-41*

*"All that is required to meet Sec. 146(3) is that there be a *reasonable possibility* of successful reorganization. This clearly does not necessitate the filing of a plan or plans contemporaneously with or closely following the filing of the petition. As a matter of fact, Chapter X does not contemplate such an early unfolding of completed plans for reorganization but rather a *more measured* procedure, *and in all cases where a disinterested trustee* is ap-

> pointed following approval of the petition, *THAT OFFICER* is the *ONLY* one who, initially, may file a plan for court approval." (Caps and Italics ours)

We are in agreement with *Esbary* and *Collier*. Certainly the accepted and usual course of judicial proceedings is to afford *some* opportunity for *creditors* to appear, and especially to require FINDINGS OF FACT AND CONCLUSIONS OF LAW when remedies are denied. A careful comparison of the facts in the instant case, with those in *Esbary*, leads to the inescapable conclusion that the Fifth Circuit has condoned herein a procedure stoutly condemned in *Esbary*! Why petitioner was not afforded the hearing to creditors and findings of fact made cardinal essentials of *Esbary*, is not known!

The decision of the Fifth Circuit is in emphatic conflict with *Marine Harbor Properties, Inc. v. Manufacturer's Trust Co.*, 1942 317 U.S. 78, 63 S. Ct. 93, 97, 87 L. Ed. 64 wherein the Court said:

> "(4, 5) The Circuit Court of Appeals . . . held that the debtor's petition was not filed in "good faith" since it was seeking to escape the jurisdiction of the state court. . . . But that is not the test which Congress has provided in Sec. 146(4). That provision requires the bankruptcy court to inquire whether "the interests of creditors and stockholders" would be better subserved in the prior proceedings or under Chapter X."

Where is there findings of fact that U. S. Internal Revenue and the extensive lien creditors would be better subserved in the prior state foreclosure proceedings? Indeed there could be none since the state foreclosure proceedings, being deficient in ability to consider any plan of reorganization, inflicted disastrous results on ALL lien holders, save and except the favored position of the bank!

RE: QUESTION NO. 3

For brevity, we refer the Court to *United States v. Key* (1970) April 15, 1970 Advance Sheets 90 S. Ct. 1049, in justification of our wanting U. S. Internal Revenue to have benefit of Sec. 199 and other priorities afforded by law. We read such decision in vain for any indication that such motive constitutes "sinister or unworthy purpose". But if such motive is either sinister or unworthy, the instant decision will undoubtedly deter many a counsel in the future from filing reorganization where large Tax Claims in favor of the U. S. are involved!

RE: QUESTION NO. 4 (Subordination)

We are not unmindful of the Boyd rule referred to in *Marine Harbor Properties*, supra, (63 S. Ct. 98) which protects senior creditors against dilution by junior or equity interests. However, decades ago, through a conservative jurist, the Supreme Court enunciated the classic *Taylor v. Standard Gas & Electric Co.* (1939) 306 U.S. 307 59 S. Ct. 543, amplified with *Pepper v. Litton* (1939) 308 U.S. 295 60 S. Ct. 238, *Prudence Realization*

Corp. v. Geist. (1942) 316 U.S. 89 62 S. Ct. 978, *Heiser v. Woodruff* (1946) 327 U.S. 726 66 S. Ct. 853, *Sampsell v. Imperial Paper Corp.* (1941) 313 U.S. 215 61 S. Ct. 904, and a host of lower Federal decisions. The *Taylor* case, supra, enunciates a rule formulated in a reorganization proceeding, based on the theory of "dominance" that where, because of existing relationships, losses are caused because of a breach of, or failure of, duty of the dominant entity — the dominant entity should not profit by having its claims satisfied at the expense of those who suffered losses, because of the relationships.

The background of this matter is unique. *202 So 2d 469 at p. 470* and *207 So 2d 244 at p. 245* disclose the law firm that represented Mr. AL GERMAN in these and a variety of other matters. This is the same law firm that handled the mortgages in favor of the Fidelity National Bank, and the same law firm that foreclosed on the mortgages in behalf of the bank. This case therefor involves what appears to be an unusual inter-relation between finance source, law source or legal source, and debtor source.

We are impressed by what was said in *Consolidated Rock Products Co. v. Du Bois* 312 U.S. 510 61 S. Ct. 675, 683:

> "... equity will not permit a holding company, which has dominated and controlled its subsidiaries, to escape or reduce its liability to those subsidiaries by reliance upon *self-serving contracts* which it has *imposed* on them. A hold-

> ing company, *as well as others in dominating or controlling positions (Pepper v. Litton. .), has fiduciary duties to security holders of its system which will be strictly enforced.* See Taylor v. Standard Gas. . . . ."
>
> (Italics ours)

If the same rule is applicable here, there was indeed fiduciary duty. True, there was not any holding company relationship, or relationship between dominant and subsidiary corporation. However, in essence, German was under the financial domination and guidance of Fidelity (one mortgage indicates that Fidelity was financing purchase-price of land as well as construction), and the latter could hardly disclaim knowledge that on the construction project, no bond protected creditors.

True, the material-lien claimants on the project were not purchasers of "securities" within the literal definition of *Du Bois*, supra. However, in essence, they expended similar value in furnishing materials and supplies for the project. Should they be exempted from the *Du Bois* rule?

Further, advances made by the bank were used to pay certain creditors in full — others only partially — and others, apparently not at all! We are unaware of the formula employed, apparently, by the bank, in determining which creditors would be favored for full payment, others only partially, or not at all! Did such formula accord with fair and equitable distribution?

Du Bois, supra, employs the term "*self serving contracts*". Is there any doubt that the mortgages herein fall within that category? When state foreclosure costs of $27,000.00 are incurred under the mortgages — *how* does this benefit the lien creditors? Attorneys' fees under the foreclosure appear claimed to the extent of $220,000.00. Will *this* be of benefit to *any* creditor, other than the bank? *If*, on the basis we know not, some doctrine of law exempts a Federal Bank from the equitable doctrine of subordination, we prevail on the Supreme Court to declare it, for, such costs will undoubtedly pose quite a problem in any successful reorganization plan.

What is unknown is "why" the bank handed a project of such magnitude *without* standard contract and bond to protect creditors and its own claim. Even if Fidelity preferred developer German to undertake construction, *why* were performance and/or material lien bonds not required? Further, the long-term commitment from Prudential called for a $2,300,000.00 sum. Did the bank make any any survey on costs to estimate the project within this sum? Should it have done so? Was any such failure the cause of creditors suffering losses? Does it accord with equitable principles for the bank to retain a priority status and discharge its loans, including ancillary and accessory charges, at the expense of other creditors?

We suggest that on account of the *extensive losses*, the District Court should have afforded *creditors* OPPORTUNITY to explore facts, in order to determine whether the doctrine of subordination applied. It is

difficult *at this time* to conclude why the bank should, from the equitable basis, be entitled to favored rank on its security, in priority over the claims of U. S. Internal Revenue (whose claims arise out of the PRINCE MURAT operations) and creditors whose UNPAID FOR materials and supplies are now owned, in title through foreclosure, by the bank. The *END EFFECT* of the decision herein permits mortgagee bank to procure these UNPAID FOR materials and services through foreclosure, without payment, on a project that mortgagee bank had *prime responsibility* for financing. *If* this be in proper accord with equitable principles, the equitable principles have had an overly harsh result!

WHEREFORE APPELLANT RESPECTFULLY URGES AND PRAYS:

(1) That certiorari be granted.

(2) That the order dismissing the petition without hearing and without findings of fact be REVERSED.

(3) That the District Court direct notices to all creditors, including U. S. Internal Revenue, and hold a hearing in accordance with Sec. 161.

(4) That after said hearing, the District Court afford creditors opportunity to approve or disapprove the petition in accordance with Sec. 144, with opportunity afforded petitioner to reply, and that thereafter the Court *EITHER:*

(5) Appoint a trustee or trustees under Sec. 156, and order submission of a plan under Sec. 169, or report on reasons why a plan cannot be effected, *OR:*

(6) Dismiss petition if it appears, under the rule announced in *Esbary*, supra (5th Cir. 1938) 93 F. 2d 746 the *impossibility* of conforming to and obtaining the benefits of the statute *clearly appears* — in which alternative the Court be required to make findings of fact and state its conclusions of law, as required by RULE 52 of the Federal Rules of Civil Procedure, and GENERAL ORDERS 37 and 47 of the Supreme Court.

(7) And for all other relief necessary.

Respectfully submitted
Application for Certiorari prepared by:
FRANZ JOSEPH BADDOCK
406 Fidelity National Bank Bldg.
Baton Rouge, Louisiana 70801
(DI 3-9194)

CERTIFICATE

Although there are no parties of record herein, other than appellant, I certify that on the day this application is filed with the Supreme Court, I will have forwarded a copy of the foregoing application to the Hon. HARVEY H. POSNER who is designated 'REFEREE IN BANKRUPTCY and SPECIAL MASTER HEREIN" c/o the latter's office, Room 327, United States Courthouse, 709 Florida Street, Baton Rouge, Louisiana.

FRANZ JOSEPH BADDOCK

ANNEXED:

1) Decision of United States District Court
2) Decree of United States Court of Appeals for the FIFTH CIRCUIT
3) Notice of denial of rehearing.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

IN THE MATTER OF	IN PROCEEDINGS FOR
OF	REORGANIZATION OF
METROPOLITAN REALTY	A CORPORATION
CORPORATION	No. BK-70-226

Absent any affirmative showing that the foregoing petition for reorganization under Chapter X of the Bankruptcy Act of METROPOLITAN REALTY CORPORATION was filed "in good faith" within the purview of Sections 141 and 146 of said Act,

IT IS ORDERED that said petition, filed herein on May 5, 1970, be and it is hereby dismissed.

Baton Rouge, Louisiana, May 6, 1970.

(Signed) E. GORDON WEST
JUDGE, UNITED STATES
DISTRICT COURT

I hereby recommended that the foregoing order be entered. *Milwaukee Postal Bldg. Corp. vs. McCann*, 95 F.2d 948 (8th Cir. 1938), followed in *Mongiello Brothers Coal Corp. vs. Houghtaling Properties, Inc.*, 309 F.2d 925 (5th Cir. 1962); see also *Shapiro vs. Wilgus, et al*, 287 U.S. 348, 53 S. Ct., 142, 77 L. Ed. 355 (1932); *Marine Harbor Properties, Inc., vs. Manufacturer's Trust Company, et al*, 317 U.S. 78, 63 S. Ct. 93, 87 L. Ed. 64, rehear-

ing denied 317 U.S. 710, 63 S. Ct. 254, 87 L. Ed. 566 (1942); and *Southern Land Title Corp. vs. Mitchell*, 375 F.2d 874 (5th Cir. 1967).

Baton Rouge, Louisiana May 6, 1970.

(Signed) HARVEY H. POSNER
REFEREE IN BANKRUPTCY
and
SPECIAL MASTER HEREIN

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30,118
Summary Calendar*

In the Matter of:
METROPOLITAN REALTY CORPORATION

METROPOLITAN REALTY CORPORATION,
Petitioner-Appellant,

Appeal from the United States District Court for the Eastern District of Louisiana

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(October 27, 1970)

Before WISDOM, COLEMAN, and SIMPSON, Circuit Judges.

WISDOM, Circuit Judge: The Metropolitan Realty Corporation appeals from a judgment of the district court dismissing its petition for reorganization filed under Chapter X of the Bankruptcy Act, 11 U.S.C. § 501. We affirm.

The case arose out of the efforts of a developer, Al H. German, in 1968 and 1969 to secure financing for a project in Baton Rouge, Louisiana, known as the Prince Murat Inn. The Prudential Insurance Company was to provide the long-term financing. The Fidelity National Bank of Baton Rouge supplied interim financing and receiving four mortgages in the amounts of $344,000, $1,700,000, $600,000, and $755,865.35. The funds obtained from the bank were evidently insufficient to pay creditors who had furnished building materials and supplies. At the time the petition for reorganization was filed, unpaid liens on the property totalled $626,211.30.

The bank attempted to foreclose on its four mortgages in a Louisiana state court proceeding. Shortly thereafter, an involuntary petition in bankruptcy was filed against German in the federal district court. Hoping to obtain the benefits of Chapter X of the federal Bankruptcy Act, German on May 1, 1970, transferred the Prince Murat Inn to the Metropolitan Realty

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*Rule 18, 5th Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5th Cir., 1970, ——— F.2d ———, Part I [No. 29278, August 14, 1970].

Corporation, a shell corporation organized solely as a medium through which he might qualify for Chapter X treatment. On May 5, 1970, Metropolitan Realty filed its petition for reorganization in the United States District Court for the Eastern District of Louisiana. Judge West presented the petition to a referee in bankruptcy, Harvey H. Posner. The following day, on the authority of *Milwaukee Postal Bldg. Corp. v. McMann*, 8 Cir. 1938, 95 F. 2d 948, and *Mongiello Bros. Coal Corp. v. Houghtaling Properties, Inc.*, 5 Cir. 1962, 309 F. 2d 925 referee Posner recommended that the petition be dismissed. On May 6 1970 Judge West entered the following order:

> Absent any affirmative showing that the foregoing petition for reorganization under Chapter X of the Bankruptcy Act of Metropolitan Realty Corporation was filed "in good faith" within the purview of Sections 141 and 146 of said Act
>
> IT IS ORDERED that said petition, filed herein on May 5, 1970, be and it is hereby dismissed.

At 10:00 a.m. on the same day, the Sheriff of East Baton Rouge Parish told the Prince Murat Inn, in a foreclosure sale, to the Fidelity National Bank, the foreclosing creditor, for $2,200,000. The sale brought an insufficient amount to pay all creditors.

Metropolitan Realty now appeals to this Court on the ground that the district court erred in dismissing

its petition before a plan for reorganization could be proposed without affording a hearing to creditors, including the Internal Revenue Service, and without filing findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. We cannot agree.

Section 141 of the Bankruptcy Act, 11 U.S.C. § 541, allows the district judge to enter an order approving the petition of a debtor only if he is "satisfied that [the petition] complies with the requirements of this chapter and has been filed in good faith." The judge must dismiss the petition if he is not so satisfied. Thus the burden is on the petitioner to convince the district court that the petition for reorganization has been filed in good faith. *Marine Harbor Properties, Inc. v. Manufacturer's Trust Co.*, 1942, 317 U.S. 78, 63 S.Ct. 93, 87 L.Ed. 64; *Mongiello Bros. Coal Corp. v. Houghtaling Properties, Inc.*, 5 Cir. 1962, 309 F. 2d 925, 929; *In re Plaza Towers, Inc.*, E.D.La. 1967, 294 F. Supp. 714, 720.

"Good faith" implies an honest intent and genuine desire on the part of the petitioner to use the statutory process to effect a plan of reorganization and not merely as a device to serve some sinister or unworthy purpose. *In re Southern Land Title Corp.*, E.D. La. 1968, 301 F. Supp. 379, 428; 6 Collier on Bankruptcy § 6.07[2], at 1025-26 (14th ed. 1969). Section 146 of the Bankruptcy Act, 11 U.S.C. § 546, provides four indicia by which a court may determine whether a petition for reorganization has been filed in good faith. But the statute expressly states that the generality of the

meaning of the term is not to be limited by the enumeration. Indeed, the generality of the term provides the bankruptcy court with a useful means of preserving the reorganization process for those cases for which it was actually intended. 6 Collier on Bankruptcy ¶ 6.07[1], at 1018-19 (14th ed. 1969). Thus, in *Milwaukee Postal Bldg. Corp. v. McCann*, 8 Cir. 1938, 95 F. 2d 948, the court held that a petition was not filed in good faith when an individual debtor had formed the petitioning corporation and conveyed his property to it solely for the purpose of utilizing the reorganization provisions of the Bankruptcy Act. In *Mongiello Bros. Coal Corp. v. Houghtaling Properties, Inc., supra*, the debtor corporation had been formed for the sole purpose of seeking reorganization and thereby avoiding foreclosure by a mortgagee in a state court proceeding. Approving the rule in McCann, Judge Bell wrote,

> In considering the presence or absence of good faith, it must be borne in mind that the Act is not to be abused by the extension of its privileges to those not within the contemplation of it, such as where individual debtors convey their property to a corporation for the purpose of utilizing Chapter X proceedings.

309 F. 2d at 930. *See also in re North Kenmore Bldg. Corp.*, 7 Cir. 1936, 81 F. 2d 656, 657.

Metropolitan Realty has admitted both in its petition for reorganization and in its appellate brief that it was formed solely as a medium by which the individ-

ual debtor German could obtain Chapter X relief. Chapter X was enacted for the purpose of facilitating the reorganization and rehabilitation of going corporate businesses. *See In re Western Tool & Mfg. Co.*, 6 Cir. 1944, 142 F. 2d 404, 409. It has nothing to do with the situation in which the debtor is an individual. *Milwaukee Postal Bldg. Corp. v. McCann*, 8 Cir. 95 F. 2d 948, 950. Under the rule of *McCann* and *Mongiello Bros.* the district court had no choice but to dismiss the petition. The petitioner not only failed to sustain his burden of showing good faith but also admitted the facts effectively precluding the court from approving his petition.

Nevertheless, Metropolitan Realty argues that the district court should not have dismissed the petition without a hearing before a plan for reorganization could be proposed. It contends that the summary action of the district court directly conflicts with this Court's decision in *R. L. Witter Associates, Inc. v. Ebsary Gypsum Co.*, 5 Cir. 1938, 93 F. 2d 746. In that case Judge Hutcheson wrote that

> if it is clear that under no reasonable possibility can the debtor conform to and obtain the benefits of the statute, and that therefore the petition was manifestly filed, if by the debtor, for delay, . . . the petition may be dismissed before the plan stage is reached, as wanting in the good faith the statute requires. Under that rule, where the good faith of the filing is attacked, before the plan stage has been reached, unless the impossibility of conform-

> ing to and obtaining the benefits of the statute clearly appears, the petition should not be dismissed as not filed in good faith. It should be retained, and questions of plan and reorganization worked out in the thorough and complete way the statute provides for later steps in the proceedings.

93 F. 2d at 748-49. We believe that the district court's action does no violence to the holding in *Esbary*. In the instant case the impossibility of Metropolitan Realty's conforming to and obtaining the benefits of the statute affirmatively appeared in the petition itself. Because of the admittedly tainted circumstances in the formation of the corporation, which would have in any eventuality precluded a finding of good faith, there was no reason for the court to delay until a plan for reorganization could be submitted. As soon as the lack of good faith affirmatively appeared, the district court acted properly in dismissing the petition even though the plan stage had not been reached. *First National Bank of Wellston v. Conway Road Estates Co.*, 8 Cir. 1938, 94 F. 2d 736, 739. Similarly there was no need for a hearing when the dispositive facts plainly appeared on the face of the petition itself. *Leas v. Courtney Co.*, 10 Cir. 1958, 261 F. 2d 13, 15; *Arey & Russell Lumber Co. v. American National Bank & Trust Co.*, 4 Cir. 1953, 201 F. 2d 508, 509. *See also Southern Land Title Corp. v. Mitchell*, 5 Cir. 1967, 375 F. 2d 874, 877.

Finally, there is no merit to Metropolitan Realty's contention that we must reverse the order dismissing

its petition because of the failure of the district court to file formal findings of fact and conclusions of law as is required by Rule 52(a) of the Federal Rules of Civil Procedure. The purpose of Rule 52(a) is "to aid the appellate court by affording it a clear understanding of the ground or basis of the decision of the trial court." *S.S. Silberblatt, Inc. v. U.S.*, 5 Cir. 1965, 353 F. 2d 545, 549; 2B W. Barron & A. Holtzoff, Federal Practice & Procedure § 1121, at 481 (Wright ed. 1961). When, as here, there are no genuine material factual issues presented, specific findings of fact and separate conclusions of law are not required. *See In re Woodman Realty Co.*, 7 Cir. 1967, 384 F. 2d 776, 780. From the recommendation of the referee in bankruptcy and the court's written order, we have no trouble in determining the basis of the court's decision.

Therefore, the judgment of the district court dismissing the petition for reorganization of the Metropolitan Realty Corporation is

AFFIRMED.

APPENDIX C

IN THE
UNITED STATES COURT OF APEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 30118
Summary Calendar

D. C .Docket No. Bk. 70-226
In the Matter of:
METROPOLITAN REALTY CORPORATION

METROPOLITAN REALTY CORPORATION,
Petitioner-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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Before WISDOM, COLEMAN and SIMPSON,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that petitioner-appellant be condemned to pay the costs on appeal in this Court.

October 27, 1970

Issued As Mandate:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30,118
Summary Calendar*

In the Matter of:
METROPOLITAN REALTY CORPORATION

METROPOLITAN REALTY CORPORATION,
Petitioner-Appellant,

Appeal from the United States District Court for the Eastern District of Louisiana

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(November 17, 1970)

ON PETITION FOR REHEARING

Before WISDOM, COLEMAN, and SIMPSON,
Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.